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SOUTHERN U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MEL M. MARIN,

CASE NO. 01CV1403WQH

Plaintiff,

ORDER

vs.

STEPHEN SHAW,

Defendant.

HAYES, Judge:

The matter before the Court is the Order to Show Cause why Defendant Stephen Shaw and Defendant Suppa, Trucchi & Henein should not be dismissed from this action.

BACKGROUND

On July 31, 2001, Plaintiff Mel M. Marin filed Complaint for Malpractice and Breach of Fiduciary Duty naming a single Defendant Stephen Shaw. Plaintiff alleged in the Complaint that Plaintiff met with for the purpose of retaining Shaw to represent him and his father in an ongoing action in state court; that Plaintiff confided information during the meeting to Defendant Shaw not generally known in the legal field or in the community at large; that at the time of the meeting Plaintiff "had another active case, Marin v. HFC in which the state judge was refusing additional extensions of time and needed an attorney for that one, confiding that the HFC judge may not believe plaintiff with no support from federal offices;" that Defendant Shaw declined to represent Plaintiff in any action because of an inability to pay and took "the information held in confidence and used that information against plaintiff in the action Marin"

1 v. HFC to engineer the dismissal of that action against plaintiff." Complaint, Page 2 and 3.

2 On February 14, 2003, Defendant Stephen Shaw represented by Samy Henein of
 3 Suppa, Trucchi & Henein, LLP filed an Answer to Plaintiff's Complaint denying each and
 4 every allegation of the Complaint and setting forth a number of affirmative defenses.

5 On October 10, 2003, Plaintiff filed a First Amended Complaint naming three
 6 Defendants as follows: 1) Stephen Shaw; 2) Suppa, Trucchi & Henein, LLP, a California
 7 Partnership; and 3) the United States Army. The court record contains Return of Service of
 8 the First Amended Complaint for the United States Army. The court record contains nothing
 9 to indicate that Defendant Stephen Shaw and Defendant Suppa, Trucchi & Henein were
 10 properly served with the First Amended Complaint.

11 On October 4, 2004, this Court granted the motion by the Defendant United States
 12 Army to dismiss for improper service and dismissed the United States Army from the action
 13 without prejudice.

14 On February 8, 2005 with leave of the Court, Plaintiffs filed a Second Amended
 15 Complaint naming four Defendants as follows: 1) Stephen Shaw; 2) Suppa, Trucchi & Henein,
 16 LLP, a California Partnership; 3) the Department of Defense; and 4) the Secretary of the
 17 Department of Defense. The record contains Return of Service of the Second Amended
 18 Complaint for the Department of Defense and the Secretary of the Department of Defense.
 19 The record contains nothing to indicate that Defendant Stephen Shaw and Defendant Suppa,
 20 Trucchi & Henein, LLP, a California Partnership were properly served with the Second
 21 Amended Complaint.

22 On March 6, 2005, this Court granted the Motion to Dismiss filed by the Department
 23 of Defense and the Secretary of the Department of Defense as to all claims in the Second
 24 Amended Complaint.

25 On March 30, 2006, this Court ordered Plaintiff to show cause why this action should
 26 not be dismissed for failure to file provide proof of service of the amended complaints upon
 27 Defendant Shaw and failure to serve any of the complaints upon Defendant Suppa, Trucchi &
 28 Henein.

1 On May 15, 2006, this Court held a hearing on the Order to Show Cause. Plaintiff
 2 appeared and informed the Court that he had mailed the amended complaints to counsel for
 3 Defendant Shaw. Plaintiff asserted that the Marshal failed to complete service upon Suppa,
 4 Trucchi & Heinen and that Defendant Suppa, Trucchi & Henein had waived service. The
 5 Court ordered Plaintiff to file proof of service of the First and Second Amended Complaints
 6 within 10 days.

7 On May 23, 2006, Plaintiff filed "Plaintiff's Proof of Service per Order of the Court "
 8 which stated in relevant part that "on 2/27/04, in a hearing the attorney for both defendant
 9 Shaw and defendant Suppa law firm, waived formal service of process for the complaints
 10 which by then had been submitted; and that on March 15, 2004 I mailed a copy of the First
 11 Amended Complaint to the same law firm as directed by the magistrate on 2/27/04; and on
 12 9/1/2004 I mailed by first class mail a copy of the Second Amended Complaint to the same law
 13 firm. . . . Suppa & Heinen 3055 India St. San Diego, CA 92103."

14 **1. Stephen Shaw**

15 Local Civil Rule 4.1(d) provides in relevant part: "Service of Pleadings other than
 16 Original Complaint. Service of an amended complaint, counterclaim, cross-claim, or third-
 17 party complaint, shall be made upon each new party to the litigation, whether or not multiple
 18 parties are represented by a single attorney. Service of all other pleadings authorized to be
 19 served in accordance with Rule 5, Fed. R. Civ. P., shall be complete when served upon the
 20 attorney for a party, if the party is represented by an attorney."

21 Rule 5 of the Federal Rules of Civil Procedure provides in relevant part that "[E]very
 22 pleading subsequent to the original complaint unless the court otherwise orders . . . shall be
 23 served upon each of the parties." Local Civil Rule 5.2 provides in part: "Proof of service of all
 24 papers required or permitted to be served, other than those for which a particular method of
 25 proof is prescribed in the Fed. R. Civ. P., shall be filed in the clerk's office promptly and in any
 26 event before action is to be taken thereon by the court or the parties. The proof shall show the
 27 day and manner of service and may be (1) written acknowledgment of service, on the original
 28 of the copy served, by the attorney or person in charge of his office receiving a copy thereof,

1 or (2) by certificate of a member of the bar of this court; (3) by affidavit of the person who
 2 mailed or otherwise served the papers, or (4) by any other proof satisfactory to the court.
 3 Failure to make the proof of service required by this subdivision does not affect the validity
 4 of the service; and the court may at any time allow the proof of service to be amended or
 5 supplied unless it clearly appears that to do so would result in material prejudice to the
 6 substantial rights of any party.

7 Stephen Shaw is represented in this action by the Suppa, Trucchi and Henein law firm.
 8 Sam Henein filed an Answer to the original Complaint on behalf of the Defendant Shaw.
 9 Plaintiff thereafter filed a First Amended Complaint and a Second Amended Complaint. While
 10 Defendant Shaw was not a new party in the First Amended Complaint or the Second Amended
 11 Complaint, Plaintiff was required to serve these pleading pursuant to Fed. R. Civ. P. 5 and to
 12 file Proof of Service with the clerk's office pursuant to Local Rule 5.2. Plaintiff has provided
 13 Proof of Service which states that he mailed a copy of the First Amended Complaint or the
 14 Second Amended Complaint to the law firm representing Defendant Shaw. The Court will
 15 not dismiss this action against Defendant Shaw.

16 **2. Suppa, Trucchi & Henein, LLP, a California Partnership**

17 Suppa, Trucchi & Henein, LLP, a California Partnership was named as a Defendant
 18 for the first time in the First Amended Complaint and named again in the Second Amended
 19 Complaint. Accordingly, Plaintiff was required to serve Defendant Suppa, Trucchi & Henein,
 20 pursuant to Rule 4 of the Federal Rules of Civil Procedure. See Local Rule 4.1. The court
 21 record contains no indication of service pursuant to Rule 4(c) or waiver of service pursuant to
 22 Rule 4(d) for either the First Amended Complaint or the Second Amended Complaint upon the
 23 Defendant Suppa, Trucchi & Henein. Pursuant to Rule 4(m) "if service of the complaint and
 24 summons is not made upon a defendant within 120 days after the filing of the complaint, the
 25 court, upon its own motion or on its own initiative after notice to the plaintiff, shall dismiss the
 26 action without prejudice as to that defendant or direct that service be effected within a specific
 27 time; provided that if the plaintiff shows good cause for the failure, the court shall extend the
 28 time for service for an appropriate time."

1 On September 28, 2001, this Court ordered as follows: "Plaintiff's application to
 2 proceed *in forma pauperis* and orders that the Clerk of the Court shall file the Plaintiff's
 3 complaint without prepayment of fees." This order did not state that the Marshall shall be
 4 responsible for service. Rule 4(c)(2) states that "Service may be effected by any person who
 5 is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the
 6 court may direct that service be effected by a United States marshal, or other person or officer
 7 specially appointed by the court for that purpose. Such an appointment must be made when
 8 the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. . ."

9 28 U.S.C. § 1915(e)(2)(B) mandates that the court review a complaint filed pursuant
 10 to the *in forma pauperis* provisions before directing service by the United States Marshal
 11 pursuant to Fed. R.Civ. P. 4(c)(2). A complaint filed by any person proceeding *in forma*
 12 *pauperis* pursuant to 28 U.S.C. § 1915(a) is subject to a mandatory and *sua sponte* review and
 13 dismissal by the court. Section 1915(e)(2)(B)(ii) states that "the court **shall** dismiss the case
 14 at any time if the court determines that . . . the action . . . fails to state a claim on which relief
 15 may be granted." (emphasis added). *See Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cr. 2001)
 16 ("The provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.").

17 The Second Amended Complaint alleges claims against Defendant Shaw for breach
 18 of fiduciary duty and legal malpractice based upon Defendant's Shaw's alleges use of
 19 information provided by Plaintiff Marin to Defendant Shaw in confidence. The only
 20 allegations in the Second Amended Complaint against Defendant Suppa, Trucchi & Henein,
 21 state "that the law firm of SUPPA, TRUCCHI & HENEIN, LLP is a co-conspirator and joint
 22 tortfeasor with defendant SHAW in every act described." Second Amended Complaint page
 23 1. There are no factual allegations in the First Amended Complaint or the Second Amended
 24 Complaint to support any claim against Defendant Suppa, Trucchi & Henein as a co-
 25 conspirator and/or joint tortfeasor with Defendant Shaw. The Second Amended Complaint
 26 fails to state any facts which taken as true would support a claim against Defendant Suppa,
 27 Trucchi & Henein The Court concludes that Plaintiff's complaint against Defendant Suppa,
 28 Trucchi & Henein is subject to dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

1 IT IS HEREBY ORDERED that Defendant Suppa, Trucchi & Henein, LLP, a
2 California Partnership dismissed without prejudice. Defendant Shaw is the only remaining
3 defendant. The Court refers the case to the Magistrate Judge for a case management
4 conference in an effort to resolve the claims against the remaining Defendant Shaw as soon
5 as possible.

6 Dated: 6/6/06

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10 WILLIAM Q. HAYES
11 United States District Judge
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13 cc: All Parties
14 Magistrate Judge Cathy Ann Bencivengo
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